Available online at www.sciencedirect.com

SciVerse ScienceDirect

Procedia - Social and Behavioral Sciences 84 (2013) 1128 – 1132

Procedia
Social and Behavioral Sciences

3rd World Conference on Psychology, Counselling and Guidance (WCPCG-2012)

Mediation in Romania – context and principles of action

Răzvan-Lucian Andronic [a] *, Ioan Ştefu [b], Camelia Olteanu [b]

[a] *Faculty of Psychology and Educational Sciences, Spiru Haret University, Turnului 7 , Braşov 500152, Romania*
[b] *Faculty of Legal and Administrative Sciences, Spiru Haret University, Turnului 7 , Braşov 500152, Romania*

Abstract

Mediation is in Romania a new way of solving the conflict relations, without them the subject of judicial approaches. Although promoted as an alternative to trial in court, mediation is used occasionally as an emerging initiative.Purpose of this study is to present the organization of mediation in Romania, the main categories of professionals involved, and their general principles of interventionThe study is based on the existing legal framework, the experience of the first nationally organized trainings, and the description of forms of organization of mediators in Romania. In essence, mediation can be seen as the art of opening an inter-personal communication channel between the conflicting parties to obtain „win-win" solutions. For the success of such a process, the mediator must be primarily a perfect communicator, creator of that communication channel and also the main support and„administrator" of it, fully confident that, regardless of the conflict causes, they can be resolved through communication.
Although mediation is currently in Romania rather theoretical alternative to the judicial system, it has the potential to develop a culture of dialogue, contributing significantly to finding solutions to conflict situations based on communication.

Selection and peer-review under responsibility of Prof. Dr. Huseyin Uzunboylu & Dr. Mukaddes Demirok, Near East University, Cyprus

Keywords: mediation, conflict, counseling,

1. Background

Alternative methods of dispute resolution (ADR), of which mediation is part, were less known in Romania until the early 1990s because it was widely accepted that only the court has the power to resolve any conflict, any misunderstanding.

In Romania, the first mediators trained abroad, began to function in the early '90s, the within NGOs, practicing this activity pro bono and without a clearly defined legal framework.

In 2003, the Ministry of Justice and the U.S. Embassy initiated a pilot project in Craiova, with which the Romanian legislature was convinced of the need to regulate mediation by law. Thus was born the mediation law and the regulation of the profession of mediator in 2006.

In 2008 was printed the first Panel of Certified Mediators which included about 300 mediators. Currently this Panel includes 2000 authorized mediators.

* Corresponding author. Tel.: +0743044300; fax: +0268548225.
E-mail address: rla_bv@yahoo.com

Selection and peer-review under responsibility of Prof. Dr. Huseyin Uzunboylu & Dr. Mukaddes Demirok, Near East University, Cyprus
doi:10.1016/j.sbspro.2013.06.713

In 2009, the Mediation Law 192/2006 was amended and completed by Law 370/2009 by which, in Romania, mediation can be applied in principle to any type of conflict, being an optional procedure, and judges are given the mandatory task to recommend it in certain types of disputes pending before the courts.

2. Purpose of study

The purpose of this study is to present the organization of mediation in Romania, the main categories of professionals involved, and their general principles of intervention.

Mediation is the legal instrument necessary to solve various types of conflicts in society, representing the only alternative to relieve the burden of the judge who has to solve so many and complex causes, while the austerity budgets of the institutions of law do not create the context of increasing the number of the staff.

3. Sources of evidence

After the restoration of democracy in 1989, in the Romanian society has been an unprecedented increase in number, complexity and severity of disputes and conflicts, both between individuals and between organizations. In recent years, disputes have increased by 30%, for various reasons: economic crisis, increasing taxes, banking disputes, etc.

The justice system in Romania is facing serious financial problems and human resources so that the decentralization of administrative and financial decisions and rationalization of costs has become a necessity.

Mediation is designed as a *justice* made by a third party, namely the mediator in the conflict between the parties in the forms and conditions prescribed by law, being regarded as a legal alternative to traditional justice made by a judge (Leaua, 2006). The path to this alternative justice through mediation is also encouraged by a much lower cost supported by the conflict parties, being promoted, especially in recent decades, both in Europe and other continents.

So, from this point of view, as well, mediation is an alternative to conflict resolution through the courts, and it combines in a balanced way the interests of citizens and the state, of a justice serving both the state and the individual. Mediation is a viable alternative not only due to its much lower costs, but also for its concern to eliminate the state of conflict as soon as possible, a mandatory requirement of the traditional justice, which currently is marked by lengthy procedures.

Thus, the Council of Europe, through the Committee of Ministers has adopted several Recommendations on mediation (Dănileţ, 2008) that states principles and courses of action for Member States, such as: Recommendation no. 98 (1) on mediation in family matters Recommendation no.99 (19) on mediation in criminal matters, Recommendation no. 9 (2001) on alternatives ways for conflicts between administrative authorities and individuals, Recommendation. (2002) 10 on mediation in civil matters.

In order to implement these recommendations, the European Commission for the Efficiency of Justice (ECEJ) of the Council of Europe adopted in 2007 three Guides in civil, criminal and administrative matters. Not only within the Council of Europe were concerns for conflict resolution by alternative methods, other than justice, but also in other EU institutions. Thus, under the same imperative to identify alternative ways to resolve these conflicts, the European Council in Tampere of 15-16 October 1999 called on Member States to implement alternative extrajudicial procedures.

Subsequently, in 2002 the European Commission adopted a Green Paper concerning alternative means to conflict resolution in civil and commercial matters. In the design of this document, the alternative means of conflict resolution, as is the case of mediation, allow parties to restore dialogue in order to find a solution to the conflict between them, rather than to close themselves in a logic of confrontation, which normally ends with a winner and a loser (Leş, 2010).

Following these European imperatives to achieve conflict resolution through mediation which were circumscribed to the accession of Romania to EU, which took place in 2007, the Law. 192/2006 on mediation and the profession of mediator was adopted in the national law.

Also internally, after joining the European Union in relation to mediation, which had to answer as much as it could to the European imperatives, was adopted the Government Ordinance no. 13/2010 which transposed into national law the Directive 2006/123/EC of the European Parliament and the Council on services in the internal market thus bringing changes and amendments to some of normative papers, including Law no. 192/2006 on mediation and the profession of mediator.

Also, another directive adopted within the European Union with direct effects on modification and completion of laws relating to mediation in the domestic law of states, including our country, was the Directive 2008/52/EC of the European Parliament and the Council on services regarding the internal market on certain aspects of mediation in civil and commercial matters which although was mainly aiming trans-border disputes mentioned herein - par. (8) - that does not prevent Member States to apply it equally to internal mediation procedures. All these European regulations have caused changes in the Romanian law, once with the adoption of the Law no. 192/2006 on mediation and the profession of mediator - a law providing the legal framework for the Romanian judicial system to resolve criminal conflicts between state and offender in other ways than only through traditional justice, such as mediation.

According to the mediation law, mediation is based on the trust that the mediator is invested with by the parties, as a neutral third party able to facilitate negotiations between them. Mediators share the same values, their work is seen as vital to society and mediation is supposed to enjoy a higher social status, consideration and esteem. Since 2006, mediation is defined by law as an independent and liberal profession in Romania and its development is very dynamic.

4. Main argument

After extensive consultations with all the stakeholders and civil society, the Ministry of Justice has worked to develop The Strategy for developing justice as a public service in 2010-2014. One of the objectives set by the strategy is to strengthen the mediation istitution, taking into account the fact that the importance of mediation as an alternative to the court, goes beyond the borders created by the needs of the judiciary system.

Setting this goal started from the desire of relieving the courts of the numerous causes – the first target of the application of mediation, but also from the perspective of full European integration, and not least, the importance of social and educational role of this institution. The successful implementation of mediation becomes more important in the context of the preparation of the implementation of new rules of judicial procedure codes, whose vision and guidelines require a functional, unified and coherent framework.

Thus, in the new Civil Procedure Code was established the requirement for the court to recommend the parties to resolve their conflict through mediation. The new Criminal Procedure Code regulated the possibility to refuse any civil claims, the defendant being able to recognize the claims of the party and the conclusion of a transaction or a mediation agreement.

However, in the perspective of promotion and widespread application of this alternative method of dispute resolution at national and European level, is still considered the conclusion of partnerships with other EU Member States, within the funding made by the European Commission of transnational projects to strengthen cooperation and exchange of information and good practice between professionals working in mediation, to ensure their training, but also to popularize this institution among litigants.

The mediation law defines mediation as voluntary and creates the legal framework for mediation as a liberal profession, including the criteria for acquiring, suspension and termination of mediation (three years of work experience, university degree, training requirements, etc..). It also prepares the ground for establishing a regulatory body - the Council of Mediation, thus creating the premises for the organization of basic training and continuing professional development of mediators. The law also establishes the framework for mediators to organize themselves in associations and also their practice, the establishment of rules of discipline, the mediation procedure and special provisions on cases guided to them by the court.

The mediation law in Romania adopted important mobilization so that the mediation to be used. For example, if the parties conclude through mediation an agreement on a dispute, it is also pending before a court, they receive full

reimbursement of the initial fee paid to the court. Moreover, the judicial and arbitrary bodies, as other authorities with jurisdictional competences are encouraged to inform the parties about the possibilities and advantages of mediation and advise them to use mediation to reach an agreement, regardless any disputes between the parties.

Choosing mediation to resolve conflicts has some advantages:

- Parties can reach solutions to meet their real needs, participating directly, with full power of decision on the final conflict;
- In a mediation session, the negotiated solution is accepted for those involved or interested in the conflict;
-Mediation greatly reduces costs (stamp fees, lawyers and expert fees, etc..);
- It saves time and avoids the stress of litigation conducted in the courtroom, avoiding the public exposure of personal problems;
- Mediation is a way to relief the courts of many causes that can be resolved by the parties, through the intervention of a mediator.

According to legal provisions, mediation can be used:

- In any litigation of civil nature;
- In any trade dispute;
- In family disputes: disputes between spouses on marriage, exercise of parental rights, the residence of children, parental contribution to child support and any other disputes arising in relations between spouses on the rights they may have under the law, concerning the divorce and ancillary claims;
- In disputes with the object of consumer disputes: when the consumer invokes the existence of damage following the acquisition of goods or defective services, the contract failure or guarantees granted, the existence of unfair terms contained in contracts between consumers and economic agents or other violation of rights under the national law or EU consumer protection;
- Regarding conflicts of rights in labor disputes;
- In criminal matters: only offenses for which the law provides that criminal liability is removed by withdrawing the prior complaint or reconciliation of the parties. In these situations, the parties do not submit the dispute for a settlement through the court in tha favor of one or the other, but employ a mechanism that allows an friendly settlement. Thus, the resolution of the case is done in a private environment, in the presence of a neutral person applying certain rules of each dispute, and the procedure takes place in a confidential framework.

However, Law 192/2006 expressly provides that there are causes that cannot be resolved by mediation, such as: strictly personal rights, such as those concerning the status of the person and any other rights the parties, under the law, cannot dispose of by any agreement or other way permitted by law. For example, the actions for establishing the paternity of a child outside marriage, actions contesting paternity or maternity, adoption dissolution action.

5. Conclusions

Viewed in relation to the traditional justice, mediation procedure transform justice shortcomings in advantages:

1. The solution given in court is a required one, while mediation, based on the principle of self-determination, leaves the parties free to choose the convenient solution for both of them, and an agreed solution, naturally does not arouse resentments, while the mandatory one has this risk;
2. The act of justice is based, by excellence, on evidence, but these do not always manage to faithfully reconstruct all relevant elements of conflict, particularly the psychological dimension. In the mediation process the parties are not obliged to prove its allegations, the reconstruction of the conflict situation is carried out without having to face the impossibility to prove any relevant element, emphasizing the importance of finding a common interest on which to base the solution and not fighting to prove the obvious contrary interests;
3. The act of justice requires the evidence of guilt, culpable conduct, raising inherent negative reactions, mutual accusations, events that bring to the surface, usually, what is most reprehensible in the human nature, often with the result of increasing the initial conflict. Mediation offers importance to empathy, communication and listening ability, designed to generate positive reactions, acceptance and understanding, bringing out the beautiful surface of human nature, serving to settling the conflict;

4. The solution given in court, be it solid and legal, does not provide the ending of the conflict, and the dissatisfaction of the losing party can even generate new conflicts. The role of mediation is to help parties to identify those solutions that ensure a win - win solution for both sides of the conflict and therefore being likely to extinguish the conflict;
5. The solution given in court does not seek to satisfy the conflicting parties equally, but it must be the result of the evaluation of evidence and proper application of legal norms, which often has the consequence of the judicial denigration by the losing party. The resolution of the conflict through mediation produces its extinction. Even if the conflict impact is confined to a narrow circle of people, the successful outcome of mediation is the resonance at the level of a group or community.

These obvious advantages place mediation close to counseling, the techniques and methods used being similar. Therefore, in Romania the mediation profession is open both for lawyers and for psychologists. Remarkably, some judges have become mediators, and many others support mediation.

According to the report on the state of justice, in 2011, courts have acquiesced 1525 mediation during the processes, and only 258 mediations in 2010. Statistics data show that this procedure started to be used in the prosecution as well, where currently only two cases were resolved through mediation.

For the cases resolved through mediation before referral to court, in time, it will be obtained a decrease of cases pending before courts. By guiding the parties to resolve the dispute through mediation, for pending cases, judges will no longer have to motivate in detail the solutions.

Solving cases through mediation will most certainly increase the quality of justice in cases that really needs a judge to clarify the facts in a dispute. For the society as a whole, in time, mediation could lead to increased tolerance of unsuitable behaviors and to another level of dispute resolution. Even if it doesn't always lead to the resolution of disputes, mediation enables parties in dispute to know and better appreciate their position in the conflict, making a more objective assessment of their future positions in an arbitral proceeding or in a common court of law.

References

Danileţ, C. (2008). *Eficienţa şi echitatea justiţiei. Standarde europene.* Bucureşti: Editura IRDO.
Directive 2006/13/CE (JOUE nr. L 376 of 27 December 2006, p. 36-38).
Directive 2008/52/CE (JOUE nr. L 136 of 24 May 2008, p. 3-8).
Leaua, C. (2006). Metode alternative de soluţionare a disputelor cu privire specială asupra medierii. Dreptul, 3, 120-137.
Leş, I. (2010). Medierea şi împăcarea părţilor în concepţia Noului Cod de procedură civilă. Curierul Judiciar, 638-688.
Recommendation no. 10 (2002) adopted by the Committee of Ministers on 18 September 2002 at the 808th meeting of ministers delegations.
Recommendation no. 9 (2001) adopted by the Committee of Ministers on 5 September 2001 at the 762th Meeting of the Ministers delegations.
Recommendation no. 98 (1) adopted by the Committee of Ministers on January 21, 1998 at the 616th reunion of ministers delegations.
Recommendation. 99 (19) adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers delegations.
Resolution no.12 from 2002 of the Committee of Ministers in 19 September 2002